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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

IN RE DENNIS MICHAEL O'CONNOR, M.D., RICHARD FRIDAY,
Petitioners.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, HONORABLE MARILYN HALL PATEL, JUDGE, *Respondent.*

MAGNO ORTEGA, M.D., *Real Party In Interest.*

Petition from Orders and Judgment of the United States District Court for the Northern District of California, Honorable Marilyn Hall Patel, Judge Presiding

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PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

DANIEL E. LUNGREN
Attorney General
ROBERT MUKAI
Chief Assistant Attorney General
MARGARET A. RODDA
Senior Assistant Attorney General
TYLER B. PON
Supervising Deputy Attorney General
PAUL T. HAMMERNESS
Deputy Attorney General
Attorney of Record
California State Bar No. 090294
50 Fremont Street, Suite 300
San Francisco, California 94105-2239
Facsimile: (415) 356-6257
Telephone: (415) 356-6373
Attorneys for Petitioners Dennis Michael O'Connor, M.D. and Richard Friday

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QUESTION PRESENTED

1. Whether the Honorable Patel, District Court Judge, disobeyed the prior mandate of this Court in *O'Connor v. Ortega*, 480 U.S. 709 (1987) by denying petitioners' summary judgment motion; directing a verdict against petitioners on liability; and stripping petitioners of their qualified immunity defense.

2. Whether this Court should exercise its supervisory jurisdiction to issue a writ of mandamus and/or prohibition vacating the respondent district court's orders, and compelling it to enter judgment in petitioners' favor, as was done in the first trial following this Court' remand.

LIST OF PARTIES

Petitioners:	Dennis Michael O'Connor, M.D. and Richard Friday
Respondent:	United States District Court for the Northern District of California, Honorable Marilyn Hall Patel, Judge
Real Party In Interest:	Magno Ortega, M.D.

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PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

PRAYER

Petitioners pray for writ of mandate and/or prohibition directed to the respondent United States District Court for the Northern District of California and to the Honorable Judge of said District Court, directing and commanding said Honorable Marilyn Hall Patel, as follows:

1. To vacate its Memorandum and Order of March 11, 1996 denying petitioners' motion for summary judgment, and to enter an order granting petitioners' summary judgment, and

2. To vacate its oral order of March 11, 1996, entering a directed verdict against petitioners and in favor of plaintiff-real party, and

3. To vacate the subsequent special verdicts and the respondent Court's judgment thereupon, and

4. To enter a judgment in favor of petitioners and against real party Ortega.

OPINIONS BELOW

The memorandum and order of the respondent Court denying petitioners' summary judgment, dated March 11, 1996 is included in the Appendix, at pp. A-1 to A-13. Petitioners have included the transcript of Judge Vukasin's ruling of December 4, 1992, entering a directed verdict in favor of petitioners at pp. A-46 to A-54 of the Appendix. The respondent's rulings appear in the transcripts of proceedings for March 6, March 11, and March 13, 1996, attached at pp. A-89 to A-122 of the Appendix. The Judgment, dated April 1, 1996, appears at pp. A-44 to A-45 of the Appendix.

JURISDICTIONAL GROUNDS

The Court has jurisdiction to issue writs of mandamus and prohibition to correct a lower court's disobedience and mistake in executing the Court's mandate, pursuant to 28 U.S.C. § 1651(a), which provides in relevant part that all federal courts are empowered to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the wages and principles of law."

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. United States Constitution, Fourth Amendment:

"The right of the people to be secure in their persons, houses, papers, and effects,

against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath of affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. Title 42, United States Code Section 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia."

STATEMENT OF THE CASE

a. Real Party's Claims; Procedural Background.

This petition for extraordinary writ is filed in this Court as the only proper remedy available to petitioners, who prevailed in 1987 in the United States Supreme Court. As set forth more fully below, the respondent district court has failed and refused to execute this Court's mandate as set forth in *O'Connor v. Ortega*, 480 U.S. 709 (1987).

The extraordinary posture of this case is highlighted by the contrary results in the two jury trials that have been held since 1987, when this Court issued its mandate. In 1992, following days of testimony, the district court entered judgment

as a matter of law in favor of petitioners, pursuant to Rule 50 of the Federal Rules of Civil Procedure. However, when the matter was retried in March of 1996, before a different judge, that judge entered judgment as a matter of law against petitioners, even before a jury had been empaneled. The respondent judge made its order sua sponte, real party having made no request, either orally or in writing, before the district court entered its order directing a verdict. At the same time, the respondent judge stripped petitioners of their qualified immunity defense. As a result, the jury entered a verdict against petitioners, awarding compensatory damages of $376,000; and assessing punitive damages against petitioners in the amount of $60,000.[1]

Clearly, one of the two district judges who presided at these trials has failed to obey this Court's mandate. As set forth now fully below, it appears that the respondent district judge has erred, warranting the intervention of this Court. The respondent essentially applied a probable cause standard in evaluating petitioners' liability, the standard which only the minority of the Court in *O'Connor v. Ortega* would have adopted. 480 U.S. at 732-33. Thus, it reached the same conclusion that the minority of the Court embraced in 1987 - that the search at issue herein was unreasonable. Moreover, despite the absence of clearly-established law prior to this Court's opinion, in this case, the respondent divested petitioners of their qualified immunity defense, in defiance of the qualified immunity jurisprudence of this Court.

This 14-year old case arose out of a complaint by real party in interest Ortega that his Fourth Amendment rights were violated under 42 U.S.C. § 1983 by petitioners, hospital administrators of Napa State Hospital who entered his locked, government-owned office without a warrant to conduct an administrative investigation of charges of misconduct. On cross-

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1. Pursuant to State law, Cal. Govt. Code § 825, petitioners have no unqualified right of indemnity from the State to cover the payment of the award of punitive damages.

motions for summary judgment, the District Court granted the petitioners' motion on all grounds raised. The Ninth Circuit Court of Appeals reversed the trial court's decision on the claim of a violation under 42 U.S.C. § 1983, and entered summary judgment against petitioners.

Petitioners Dennis M. O'Connor and Richard Friday were employees of the Napa State Hospital of the State of California. Dr. O'Connor was the Executive Director, Mr. Friday was the hospital administrator; Real Party Dr. Magno J. Ortega, is a licensed physician and psychiatrist who had held the position of Chief of Professional Education at Napa State Hospital from 1964 to September 1981.

On July 30, 1981, Dr. O'Connor informed Dr. Ortega that he planned to investigate the management practices of Dr. Ortega's department. Previously Dr. O'Connor had received complaints against Dr. Ortega. These complaints included charges that 1) medical residents had been coerced into purchasing a computer; 2) Dr. Ortega had entered into improper contracts involving the computer; 3) female residents had been sexually harassed; and 4) a doctor had been improperly placed on involuntary leave by Dr. Ortega.

At the July 30 meeting, Dr. O'Connor stated that he intended to place Dr. Ortega on administrative leave. Dr. Ortega instead requested that he be permitted to take two weeks vacation commencing on Friday, July 31, 1981. Dr. O'Connor confirmed the request in a memo which further directed Dr. Ortega to remain off hospital grounds unless he had Dr. O'Connor's written approval to return. On Friday, August 14, 1981, Dr. O'Connor ordered Dr. Ortega by letter to go on administrative leave with pay because the investigation was incomplete.

Shortly after the July 30, 1981 meeting with Dr. Ortega, Dr. O'Connor selected three hospital personnel to investigate the charges against Dr. Ortega. They included an accountant (Mr. Arnold), a physician (Dr. Laskay), and a hospital peace officer attached to security service (Mr. Stratton). Mr. Friday directed

the investigative team. As part of the investigation he authorized entry into the office to investigate the charges of misconduct (including complaints of sexual harassment reported by residents supervised by Ortega), and to have state property identified and secured, including residents' files. Further justification for the entry was based on a report to Dr. O'Connor that Dr. Ortega had returned to hospital grounds and removed the computer in question from the hospital to his home during the weekend of August 15th and 16th. Dr. O'Connor was concerned that a theft of state property may have occurred.

Sometime after the weekend the computer was removed, and in the continuing course of the investigation, Dr. Ortega's office door was unlocked, his office entered, and its contents inventoried. Following the search of the office, real party was terminated, and that termination was upheld in appellate proceedings in state court.

As noted above, the Ninth Circuit reversed the trial court's entry of summary judgment in favor of petitioners, in 1985. On certiorari, this Court reversed the Ninth Circuit. In its opinion, this Court held:

> "A search to secure state property is valid as long as petitioners had a reasonable belief that there was government property in Dr. Ortega's office which needed to be secured, and the scope of the intrusion was itself reasonable in light of this justification. Indeed, petitioners have put forward evidence that they had such a reasonable belief; at the time of the search, petitioners knew that Dr. Ortega had removed the computer from the Hospital. The removal of the computer, together with the allegations of mismanagement of the residency program and sexual harassment, may have made the search reasonable at its inception under the standard we have put forth in this case."

480 U.S. at 728.

This Court further stated:

> "On remand, therefore, the District Court must determine the justification for the search and seizure, and evaluate the reasonableness of both the inception of the search and its scope."

Id. at 729.

b. The First Trial in 1992; Judgment Entered in Favor of Petitioners.

On remand, a jury trial commenced in 1992 before the Honorable J. P. Vukasin, United States District Judge. Following days of testimony, the district court entered judgment as a matter of law in favor of petitioners, pursuant to Rule 50 of the Federal Rules of Civil Procedure (See Transcript of 12/4/92, App. at A-49 to A-50, included in the Exhibits to this Petition). Judge Vukasin stated:

> "The Court: Federal Rule of Civil Procedure 50(A)(1) provides, inter alia, if: ". . . . there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the Court may grant a motion for judgment as a matter of law against that party on any claim. . ."
>
> "It appears to the Court that the plaintiff did not establish a legally sufficient evidentiary basis for a reasonable jury to have found. . . to find for the plaintiff on his claim, or claims".

> "As a matter of fact, much to the Court's surprise, it appears that in many regards the plaintiff enhanced the defendants' case, and in fact presented the defendants' case for the defendants on cross-examination of witnesses O'Connor and Friday. Earlier I was wondering if there was sufficient basis for the Court to rule on a motion such as this at this stage absent presentation of testimony by the defendants on their direct case, but it appears that the plaintiff filled in any holes that may have been missing, and provided the evidence necessary for the Court to be able to rule at this time."
>
> "Therefore, the Court finds that defendants' motion for judgment as a matter of law at this stage is justified, that there's no legally sufficient evidentiary basis for a reasonable jury to find in favor of the plaintiff and therefore defendants' motion is granted". (App. at pp. A-49 to A-50).

Judge Vukasin's ruling was nullified, however, on procedural grounds by the Ninth Circuit, a judge of the panel expressing, however, his opinion that the United States Supreme Court had wrongly decided this case.[2/]

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2. The Ninth Circuit's opinion appears at pp. A-123 to A-128 in the Appendix. Given real party's failure to identify, in that appeal, by way of offer of proof, any relevant evidence which the excluded witnesses would have proffered, the ruling by the Ninth Circuit appears to have been a referendum on its feelings about this Court's reversal of it in 1987. None of the witnesses whom real party had claimed were wrongfully excluded in 1992 testified on any substantive point in the 1996 retrial. Petitioners request leave to submit the full transcript of the 1992 trial, which was submitted in

c. Proceedings in 1996; The Second Trial.

On remand from the Ninth Circuit, the case was reassigned for further proceedings to the respondent judge, Judge Vukasin having died in the interim. In November of 1995, petitioners presented, by way of a renewed summary judgment motion (containing the recorded testimony and exhibits from the 1992 trial), the undisputed facts with respect to the petitioners' justification for the search at issue.

The respondent Court initially took the motion under submission, and set the retrial for commencement on March 11, 1996. On the first day of trial, however, the Court issued two contradictory orders which are the subject of this petition, and relief from which petitioners pray herein.

In its written memorandum and order re petitioners' summary judgment motion, on one hand, the respondent judge found an issue of fact to exist as to the reasonableness of the search (App. at pp. A-10 - A-11). However, the same day, following a voir dire hearing, the respondent Court directed a verdict against petitioners on the primary search claim at issue. In disregard of this Court's mandate, the respondent Court ruled as a matter of law that petitioners' reliance upon complaints of sexual harassment was unreasonable as a matter of law, and could not have provided any justification for the searches at issue. In so ruling, the respondent disregarded completely this Court's opinion in this case, in which this Court expressly held that investigation of the complaints of sexual harassment was one of the factors to be considered on remand in determining the reasonableness of the search. 480 U.S. at 728.

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toto in support of petitioners' summary judgment motion in 1996. The petitioners' moving papers appear at App., pp. A-14 to A-43, and accurately summarize the undisputed evidence which should have resulted in summary judgment in favor of petitioners.

The respondent Court's action was particularly egregious, since it had been provided in petitioners' summary judgment papers, exactly the same evidence which had provided the basis for Judge Vukasin's entry of judgment in favor of petitioners. This error of the respondent was magnified by its concurrent ruling that petitioners could not assert the defense of qualified immunity to protect themselves against an award of damages. The respondent judge made the somewhat astounding observation that the prior law regarding the standard for workplace searches was merely repeated by this Court in its opinion in *O'Connor v. Ortega*. (App. at A-86).

Following respondent Court's entry of a partial directed verdict, the jury entered a verdict against petitioners on liability and damages, awarding $376,000 in compensatory damages and $60,000 in punitive damages against petitioners O'Connor and Friday. This verdict was the direct consequence of the respondent Court's failure to apply the law of the case as announced by this Court in *O'Connor v. Ortega*, in which it ruled that all the circumstances, including the complaints of sexual harassment, were to be considered in determining the reasonableness of petitioners' conduct.[3] The fundamental error of the respondent Court's rulings is highlighted by the correct ruling of Judge Vukasin in 1992, who, faithfully applying the law of the case, found as a matter of law, i) that no genuine factual dispute existed as to the reasonableness of the search, and ii) that petitioners' conduct was reasonable under the Fourth Amendment standards announced by this Court in its opinion in this case.

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3. In the 1996 trial, the respondent district judge's sua sponte entry of a directed verdict against petitioners was coupled with an evidentiary ruling - respondent excluding all evidence of the complaints of sexual harassment during the liability phase. During the subsequent damage phase, the district court only allowed petitioners to testify as to their receipt of those complaints, while excluding all corroborating evidence, including Dr. Laskay's investigative report.

REASONS FOR GRANTING THE WRIT

I

THE SUPREME COURT SHOULD GRANT THE WRIT TO CORRECT THE DISOBEDIENCE OF THE RESPONDENT TO THIS COURT'S PRIOR MANDATE

In its prior opinion in this matter, this Court directed that a "reasonableness" standard would govern the lower court's determination, upon remand, of petitioners' workplace search. The Court noted that imposition of a probable cause standard in this case would be unfair and impracticable: "It is simply unrealistic to expect supervisors in most government agencies to learn the subtleties of the probable cause standard." 480 U.S. at 724-25.

Here, after paying lip service to the principles of "reasonableness", the respondent Court evaluated the conduct of petitioners as if they were policemen.[4] Indeed, in ruling that the evidence of complaints of sexual harassment were "too stale" or too generalized to provide a basis for the search, the respondent Court employed standard probable cause verbiage and analysis, while noting (incorrectly) that Dr. O'Connor had "been a law enforcement officer." (Transcript of 3/11/96, App. at p. A-110).

The "staleness" doctrine is applied in the context of the law of criminal procedure, governing the probable cause analysis applied to law enforcement officers in preparing search warrant affidavits and in seeking search warrants. 2 La Fave, Search and

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4. During pretrial proceedings, the respondent Court stated: "What was the exigency to do a warrantless search? If they changed the lock on the door and he was not there, to remove things, why could not they have gotten a warrant?" Transcript of 3/6/96, App. at p. A-78.

Seizure, § 3.7(a), at pp. 338-355 (3rd ed. 1996). Its application by the district court here is consistent only with the *O'Connor v. Ortega* minority's proffered probable cause standard, 480 U.S. at 732-33. The respondent flagrantly disregarded the common-sense, reasonableness approach which this Court dictated was to govern the conduct of petitioners - hospital administrators engaged in a non-criminal, administrative investigation of Dr. Ortega's management of the residency program.

Likewise, the respondent district court's ruling that the complaints of sexual harassment were "too vague" and generalized to provide any valid basis for the search incorporated standard probable cause analysis used in the context of criminal procedure - an approach that cannot be squared with this Court's opinion in this case. The analysis employed by the respondent parroted that employed by the criminal law in the context of gauging search warrant affidavits which are based upon information provided to an affiant peace officer by an informant. 2 La Fave, supra, § 3.3(e), at pp. 154-157.

The touchstone of the Court's rationale in the *O'Connor* opinion was its understanding that imposition of a warrant requirement, and probable cause analysis in the context of workplace searches would be unsuitable, unworkable, and would unduly burden state officials engaged in informal disciplinary investigations. 480 U.S. at 719-721. The unsuitability of the respondent district court's application of the criminal procedure/probable cause analysis here is reflected by the respondent's inaccurate and skewed characterization of the record before it.[5] This was, petitioners submit, a direct result of the

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5. The undisputed evidence before the district court demonstrated not only that the complaints of Ortega's sexual harassment reported to Dr. O'Connor had been ongoing for years, but had continued to the present. (Dr. Pranger Testimony, App. at A-92 to A-95). The complaints were not vague because of any unreliability of the informant, but because the victims had reported Dr. Ortega's misconduct to Dr. Pranger in the context of confidential weekly counseling sessions. (Pranger Test., at A-95).

district court's misapplication of probable cause analysis in a context forbidden to it by this Court's mandate. Petitioners were simply not equipped, by virtue of their training, education or experience, to engage in the complex probable cause analysis improperly imposed by the respondent district court. They should not have been required to, upon penalty of the resulting ruinous damage award. "Imposing unwieldy warrant procedures in such cases upon supervisors, who would otherwise have no reason to be familiar with such procedures is simply unreasonable." 480 U.S. at 722.

The respondent Court's disobedience to this Court's mandate was not limited to its misapplication of the standard of liability. As noted above, the respondent court also ruled, after directing a verdict on liability, that petitioners could not assert qualified immunity as a defense to real party's damage claims. Although this Court in its opinion in this case had expressly left open the issue of qualified immunity, 480 U.S. at 729 n. 1, at least one appellate court, following *O'Connor v. Ortega*, ruled that qualified immunity would apply in the circumstances of this case. *Shields v. Burge*, 874 F.2d 1201 (7th Cir. 1989).

The use of probable cause analysis by the respondent judge was particularly startling, since it was exactly the opposite of that employed by Judge Vukasin, four years earlier, after he had heard days of testimony. (Appendix, Transcript of December 4, 1992, at p. A-49 to A-50).

Given the respondent Court's flagrant disobedience to the mandate of this Court, this case presents on exceptional circumstance appropriate for the remedy of mandamus. By this proceeding, petitioners seek to exercise what this Court has ruled is the only proper remedy available to a party who has prevailed in the Supreme Court where the lower court "does not proceed to execute the mandate, or disobeys and mistakes its meaning." *United States v. Fossatt*, 20 How. 445, 446 (1858).

The relief sought by this petition is not available by other means, and there is no adequate remedy, in any other

court than this Court. *General Atomic Co. v. Felter*, 436 U.S. 493, 497 (1978).

> "A litigant who, like [petitioners] has obtained judgment in this Court after a lengthy process of litigation, involving several layers of courts, should not be required to go through the entire process again to obtain execution of the judgment of this Court."

Id. at 497.

The observation by the Court in *Felter* is especially apt in the circumstances of this case, given the apparent willingness of the Ninth Circuit to reverse Judge Vukasin, who demonstrated his fidelity to the precedent laid down by this Court. If allowed to stand unremedied by the immediate correction of this Court, the concept of "reasonableness" as the touchstone of workplace searches will be effectively drained of its meaning.

Moreover, the well-publicized result in this case (with a $376,000 compensatory damage award and $60,000 punitive damage award) will doubtless chill employers and supervisors in their investigation of workplace misconduct, especially given the district court's stripping away of the qualified immunity defense.

II

THE UNPRECEDENTED REJECTION OF THIS COURT'S QUALIFIED IMMUNITY JURISPRUDENCE BY RESPONDENT WARRANTS THE EXTRAORDINARY INTERVENTION OF THIS COURT

Even were the respondent court correct in its unsolicited and sua sponte ruling on liability, it would be difficult to imagine a clearer case for the application of qualified immunity. Until this Court announced its opinion in 1987 in this case, it can hardly be said that the law governing workplace office searches

was "clearly established" within the meaning of qualified immunity jurisprudence. The keystone of this Court's opinions in the law of qualified immunity is the principle that if the case law, in factual terms, has not staked out a bright line, that qualified immunity will protect the state official. *Anderson v. Creighton*, 483 U.S. 635 (1987); *Harlow v.Fitzgerald*, 457 U.S. 800 (1982). This principle is precisely what the respondent judge rejected when she expounded the basis for her ruling.[6] Should this Court allow this ruling by respondent to stand, the salutary underpinnings of the immunity will be seriously undermined. Its purpose is, after all, to protect public officials "from undue interference with their duties and from potentially disabling threats of liability". *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982).

The respondent's error on the point of qualified immunity is especially mystifying, given this Court's admonishment in 1991 to the judges of the Ninth Circuit, in particular. In *Hunter v. Bryant*, 502 U.S. 224, 227 (1991), the Court reemphasized: "[A] court [considering a claim of qualified immunity] should ask whether the [state official] acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable interpretation of the events can be constructed five years after the fact." Or, in the instant case, fifteen years after the fact.[7]

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6. The respondent court stated:

> "I don't see that they [the Supreme Court] really stake out any new law". (App. at p. A-86).

7. Especially telling, perhaps, is the respondent's error in ignoring the element of legal advice being sought by petitioners from departmental counsel prior to initiating the search of real party's office. In some circuits, at least, this has been considered of some relevance in evaluating claims of qualified immunity. *Swanson v. Powers*, 937 F.2d 965 (4th Cir. 1991); *Slone v. Herman*, 983 F.2d 107 (8th Cir. 1993). Even a panel of the Ninth Circuit has so ruled. *Lucero v. Hart*, 915 F.2d 1367, 1371 (9th Cir. 1990).

The respondent court's disobedience to this Court's qualified immunity jurisprudence may also simply reflect the developing trend in the opinions of the Ninth Circuit rejecting any separate qualified immunity inquiry in Fourth Amendment cases, especially involving claims of police excessive force. *Scott v. Henrich*, 39 F.3d 912 (9th Cir. 1994); *Hopkins v. Andaya*, 958 F.2d 881, 885 (9th Cir. 1992). This trend is inimical to the important public policies underlying the qualified immunity defense, as well as being fundamentally unfair. State hospital administrators, whose primary obligation is to provide care to their patients, should not be expected to engage in the kind of probable cause analysis and legal scholarship normally associated with law professors, academicians, and trained law enforcement officers.

CONCLUSION

In *O'Connor v. Ortega*, 480 U.S. 709 (1987), a majority of this Court promulgated a workable "reasonableness" standard. It is unconscionable that the same petitioners, who brought the case to the court, have now been mulcted in punitive damages because of the respondent court's studied refusal to apply the law of the case as announced by this Court. A more extreme exemplar of judicial defiance can hardly be imagined, and only that conduct of respondent justifies the extraordinary relief sought in this petition.

Wherefore, petitioners pray that this Court issue the writs of mandamus and/or prohibition specified above, as this Court may deem appropriate, directed to the Honorable Patel, District Judge.

Petitioners further pray that this Court grant petitioners such other and further relief as it may deem to be just and equitable.

Dated: April 23, 1996.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General

Paul T. Hammerness

PAUL T. HAMMERNESS
Deputy Attorney General
Attorney of Record

Attorneys for Petitioners Dennis Michael O'Connor, M.D. and Richard Friday